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No. 16-466

IN THE

Supreme Court of the United States

BRISTOL-MYERS SQUIBB COMPANY,
Petitioner,

v.

SUPERIOR COURT OF CALIFORNIA
FOR THE COUNTY OF SAN FRANCISCO *et al.*,
Respondents.

On Writ of Certiorari
to the California Supreme Court

BRIEF FOR PUBLIC JUSTICE, P.C. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

INTEREST OF THE *AMICUS* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 7

I. The Exercise of Personal Jurisdiction Over BMS Satisfies Due Process. 7

A. Specific Jurisdiction Should Be Analyzed as an Application of *International Shoe's* Requirement of "Fair Play and Substantial Justice." 7

B. The Exercise of Jurisdiction Over BMS Comports with "Traditional Notions of 'Fair Play and Substantial Justice.'" 9

C. BMS Has Not Shown That California's Exercise of Personal Jurisdiction Is In Any Way Unfair or Unjust 13

II. The Exercise of Personal Jurisdiction Over BMS Is Consistent With Both This Court's Precedents and With Longstanding Rules for Joint, Multi-State Litigation. 14

III. State Law Provides Procedural Safeguards to Ensure that Multi-State, Multi-Plaintiff Litigation Does Not Offend Due Process. 22

IV. State Courts Traditionally Have Exercised Personal Jurisdiction Over Defendants in Multi-State Mass Torts and Class Actions 24

A. Principles of Federalism Do Not Limit a State Court's Exercise of Personal Jurisdiction over Out-of-State Parties. 24

B. State Courts Have Long Overseen Multi-State Mass Tort and Class Action Litigations Concurrently with the Federal Courts. 25

C. State Courts Are Well-Equipped to Adjudicate Mass Torts. 27

CONCLUSION 29

TABLE OF AUTHORITIES

CASES

Burger King Corp. v. Rudzewicz,
471 U.S. 462 (1985) ..... *passim*

Daimler A.G. v. Bauman,
134 S. Ct. 746 (2014) 2, 4

Goodyear Dunlop Tires Operations, S.A.,
564 U.S. 915 (2011) 4, 10

Gross v. Gynecare,
No. A-0011-14T2, 2016 WL 1192556
(N.J. Super. Ct. App. Div. Mar. 29, 2016) 26

Gulf Offshore Co. v. Mobil Oil Corp.,
453 U.S. 473 (1981) 6, 24, 27, 28

Helicopteros Nacionales de Colombia, S.A. v. Hall,
466 U.S. 408 (1984) 8, 10

In re Johnson & Johnson Talcum Powder Products Marketing, Sales Practices & Products Liability Litigation,
MDL No. 2738, slip. op. (J.P.M.L. Oct. 4, 2016) 28

In re Pelvic Mesh / Gynecare Litigation,
426 N.J. Super. 167 (N.J. Super. Ct. App. Div. 2012) 25

Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee,
456 U.S. 694 (1982) 6, 25

International Shoe Co. v. Washington,
326 U.S. 310 (1945) ..... *passim*

J. McIntyre Machinery, Ltd. v. Nicastro,
564 U.S. 873 (2011) 7, 10

Keeton v. Hustler Magazine, Inc.,
465 U.S. 770 (1984) ..... *passim*

Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach,
523 U.S. 26 (1998) 20

McGee v. International Life Insurance Co.,
355 U.S. 220 (1957) 8

Milliken v. Meyer,
311 U.S. 457 (1940) 2

Phillips Petroleum Co. v. Shutts,
472 U.S. 797 (1985) ..... *passim*

Walden v. Fiore,
134 S. Ct. 1115 (2014) 7

World-Wide Volkswagen Corp. v. Woodson,
444 U.S. 286 (1980) ..... *passim*

STATUTES AND RULES

28 U.S.C. § 1407 5

Cal. Code Civ. P. § 404 21

Cal. Code Civ. P. § 404.1 11

Cal. Code Civ. P. § 418.10(a)(2) 22

OTHER AUTHORITIES

Federal Judicial Center & National Center for State Courts, *Coordinating Multijurisdiction Litigation: A Pocket Guide for Judges* (2013) 26

Federal Judicial Center, *Appendix D: Individual Characteristics of Mass Torts Case Congregations* (Jan. 1999) 25

National Center for State Courts, *Mass Torts: Lessons in Competing Strategies and Unintended Consequences*, 2 Civ. Action, no. 2 (Spring 2003) 28

Proceedings of the Middle Atlantic State-Federal Judicial Relationships Conference, 162 F.R.D. 173 (1994) 28

Twitchell, Mary, *The Myth of General Jurisdiction*, 101 Harv. L. Rev. 610 (1988) 3, 10

INTEREST OF THE *AMICUS*[1]

Public Justice, P.C. ("Public Justice") is a national public interest law firm that pursues high impact litigation to enhance the public's access to justice. Public Justice routinely advocates in courts across the nation, including the Supreme Court of the United States, by filing *amicus curiae* briefs in cases involving issues of vital public concern.

The issues presented in this case are of substantial importance to the public interest throughout the United States. In this case and many others across the country, corporations are attempting to limit injured plaintiffs' access to justice by advocating such a narrow reading of this Court's personal jurisdiction precedent as to effectively deny injury victims access to state courts.

Public Justice submits this brief to assist the Court in understanding why the ruling of the California Supreme Court affirming specific personal jurisdiction over Petitioner Bristol-Myers Squibb Company (hereinafter "BMS") comports with traditional notions of fair play and substantial

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[1] Both Petitioner and Respondents have submitted letters to the Court granting blanket consent to the filing of *amicus curiae* briefs in support of either or neither party. No counsel for either party authored this brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of this brief; no person other than Public Justice, P.C., its members, or its counsel made such a monetary contribution.

justice and thus with this Court's personal jurisdiction jurisprudence.

SUMMARY OF ARGUMENT

This Court's canonical decision expanding the scope of personal jurisdiction in state court over out-of-state corporate defendants, *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), announced the core principle for constitutional assertions of personal jurisdiction: "due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend '*traditional notions of fair play and substantial justice.*'" *Id.* at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)) (emphasis added). So long as the legal obligations at issue in a case "arise out of or are connected with" the corporation's activities within the state, the court's exercise of personal jurisdiction over the defendant can "hardly be said to be undue." *Id.* at 319.

Here, BMS argues that unless a defendant is sued "at home," where it is either incorporated or has its principal place of business, *see Daimler A.G. v. Bauman*, 134 S. Ct. 746, 760-61 (2014), personal jurisdiction *only* exists when the plaintiff's injury was proximately caused by a non-resident defendant's contacts in a forum.

Under this extreme approach, a court is prohibited from exercising jurisdiction over a non-resident defendant on a "non-proximate" cause of action, no matter how extensive the defendant's

contacts with the forum state; how related the cause of action to the defendant's activities in the state; how many benefits the defendant has gleaned from its business in the forum; and regardless of whether the defendant may already be "haled" into the forum court on identical claims.

BMS's approach, *amicus* submits, would dramatically alter existing jurisprudence, makes no sense in today's world of national commerce, and does not comport with long-standing notions of due process.

As this Court recognized long ago in *International Shoe*, at their core, questions of personal jurisdiction boil down to a question of fundamental fairness: does the exercise of jurisdiction over a defendant comport with "traditional notions of fair play and substantial justice"? 326 U.S. at 316. In a case in which, as here, the plaintiffs' claims do not directly arise out of the defendants' forum contacts yet are directly related to activities that the defendant has purposely directed at the forum, it makes no sense to cut the jurisdiction inquiry off at its roots.

Instead, in keeping with *International Shoe*'s focus on fundamental fairness, a focus grounded in due process, a court should consider "whether the defendant's contacts with the state were deliberate, whether the defendant was seeking economic benefit from a forum market, and whether the defendant might reasonably have anticipated suit in the state by reason of its claim-related activities." Mary Twitchell, *The Myth of General Jurisdiction*, 101 Harv. L. Rev. 610, 663 (1988).

Under this formulation, there is no sound basis to argue that the exercise of jurisdiction over BMS in this case offends due process. BMS's contacts with California were ongoing, systematic, and deliberate; it was seeking an economic benefit in California, to the tune of nearly $1 *billion* in Plavix sales, alone, from 2006-2012, Pet'r's Pet. 5; and it is being sued by both California and non-California plaintiffs, together, for injuries suffered as a result of BMS's uniform, national marketing practices that caused harm both in California and elsewhere. Given this fact pattern, which is nothing like the conduct alleged in cases like *Goodyear Dunlop Tires Operations, S.A.*, 564 U.S. 915, 919-921 (2011), and *Daimler*, 134 S. Ct. at 760-61, the notion that it would be "unfair" for BMS to be "haled" into a California court on respondents' claims is almost laughable.

This conclusion is underscored by the fact that this Court has, on at least two prior occasions, rejected due process challenges to a court's exercise of personal jurisdiction over the claims of out-of-state plaintiffs against out-of-state defendants. *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984); *Phillips Petrol. Co. v. Shutts*, 472 U.S. 797 (1985). In *Keeton*, this Court held that New Hampshire could exercise specific jurisdiction over *Hustler Magazine* in a libel action arising out of a nationwide publication, even though neither the plaintiff nor the defendant resided in the forum state and most of the plaintiff's injuries occurred elsewhere. 465 U.S. at 780. And in *Shutts*, the Court allowed a nationwide class action to proceed against a non-resident oil company defendant in state court, despite the fact that only a tiny percentage of the alleged injuries arose out of

the defendant's activities in the forum. 472 U.S. at 799-801. The situation in this case is analogous: as in *Keeton*, respondents' claims all relate directly to a common, nationwide course of conduct on BMS's part; and, as in *Shutts*, there is no basis for arguing that BMS lacks the requisite contacts with the forum state such that allowing the litigation to proceed would offend "fair play and substantial justice." *Int'l Shoe*, 326 U.S. at 316.

Another helpful analogy can be drawn from federal multi-district litigation (MDL) proceedings under 28 U.S.C. § 1407, which this Court has endorsed often. Ironically, given how often it waves the "federalism" flag in defense of its position, BMS points to this procedure as a preferred, more "efficient" alternative to the California Supreme Court's approach. *See* Pet'r's Br. 50-51. But this argument proves too much, for if federal MDLs do not offend due process, then neither does the lower court's ruling—and, of course, vice versa, as respondent explains. *See* Resps.' Br. 38-46 (arguing petitioner's novel causation requirement would disrespect federalism and "render unconstitutional . . . the entire federal [MDL] scheme").

BMS's arguments also ignore that numerous procedural safeguards exist to protect the interests of defendants in multi-plaintiff, multi-state litigation, including choice-of-law rules and *forum non conveniens* motions. Many of these doctrines would make little sense if state courts could not exercise personal jurisdiction over defendants in these circumstances. And such doctrines provide important protections to ensure that the exercise of jurisdiction in such cases will not offend substantial

justice and fair play. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477 (1985).

BMS's "federalism" argument also is belied by this Court's recognition that "State courts routinely exercise subject-matter jurisdiction over civil cases arising from events in other States and governed by the other States' laws." *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 481 (1981). Beyond that, this Court has rejected unequivocally the idea that the "federalism concept operate[s] as an independent restriction on the sovereign power of a court." *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n.10 (1982).

Finally, it is important to remember that state courts have long overseen multistate mass tort and class actions in a wide range of areas; have great expertise in applying state tort laws; and conduct multidistrict litigation quickly and more efficiently than their federal counterparts. Thus, the result that BMS seeks in the name of "efficiency" would deprive many plaintiffs of the fairest and most expeditious forum for resolution of their claims. For many mass tort plaintiffs facing life-threating injuries, the delays encountered in cumbersome federal MDLs can effectively cut-off their access to any meaningful relief.

For all of these reasons, this Court should affirm the ruling of the California Supreme Court and remand this case for further proceedings.

ARGUMENT

I. THE EXERCISE OF PERSONAL JURISDICTION OVER BMS SATISFIES DUE PROCESS.

A. Specific Jurisdiction Should Be Analyzed as an Application of *International Shoe's* Requirement of "Fair Play and Substantial Justice."

Since *International Shoe*, this Court has had numerous opportunities to flesh out the boundaries of specific personal jurisdiction. In virtually every case, the Court has explained that the test for finding specific jurisdiction over an out-of-state defendant is an application of the "fair play and substantial justice" standard articulated in *International Shoe*. *See, e.g.*, *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980); *Keeton*, 465 U.S. at 780-81; *Burger King*, 471 U.S. at 464; *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 880 (2011); *Walden v. Fiore*, 134 S. Ct. 1115, 1121 (2014).

Moreover, the Court has made clear that, when a defendant has purposefully availed itself of the forum by directing its activities into the state, the requirements for finding jurisdiction are not onerous:

> where the defendant "deliberately" has engaged in significant activities within a State, . . . he manifestly has availed himself of the privilege of conducting business there, and because his activities are shielded by "the benefits and protections" of the forum's laws it is presumptively not unreasonable to

> require him to submit to the burdens of litigation in that forum as well.

Burger King, 471 U.S. at 475-76 (quoting *Keeton*, 465 U.S. at 781).[2]

Each of the three main elements of the test this Court has developed for specific personal jurisdiction reflects this core due process focus on "fair play and substantial justice" and should be understood as an application of that constitutional standard. The requirement that a defendant must have "purposefully directed" its activities at the forum state, *Keeton*, 465 U.S. at 774, puts the defendant on "clear notice that it is subject to suit there," *World-Wide Volkswagen*, 444 U.S. at 297. The requirement that the litigation must result from "alleged injuries that 'arise out of or relate to' those activities," *Burger King*, 471 U.S. at 472 (quoting *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984)), provides "fair warning" about the nature of the litigation to which a potential defendant may be exposed, so that it may take steps to alleviate or insure against that risk. *Id.* Finally, "[o]nce it has been decided that a defendant has purposefully established minimum contacts within the forum State," the requirement that a court consider those contacts "in light of other factors" that bear on the

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[2] This conclusion reflects this Court's understanding that, "because 'modern transportation and communications have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity,' it usually will not be unfair to subject him to the burdens of litigating in another forum for disputes relating to such activity." *Id.* at 474 (quoting *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223 (1957)).

reasonableness of an "assertion of personal jurisdiction," *id.* at 476, provides necessary flexibility to ensure that too rigid an application of the minimum contacts analysis not undermine the due process concern of fair play and substantial justice.[3]

B. The Exercise of Jurisdiction Over BMS Comports with "Traditional Notions of 'Fair Play and Substantial Justice.'"

As the California Supreme Court correctly recognized, all three requirements, and thus fair play and substantial justice, are satisfied here. Pet'r's App. at 24a, 32a, 44a.[4] BMS purposefully directed its uniform, national marketing campaign for Plavix into California, resulting in hundreds of millions of dollars of sales of the drug in the state. Pet'r's App. at 5a, 28a. Thus, BMS's "conduct and connection with [California] are such that [it] should reasonably anticipate being haled into court there, . . . the foreseeability that is critical to due process analysis."

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[3] It should be noted that, under this Court's precedents, these "other factors" are generally intended to expand, not narrow, the scope of personal jurisdiction, i.e., "to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required." *Id.* at 477. By contrast, "where a defendant who purposefully has directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable. Most such considerations usually may be accommodated through means short of finding jurisdiction unconstitutional." *Id.*

[4] Indeed, as the California Supreme Court noted, Pet'r's App. at 21a n.2, BMS did not even contest that the first and third requirements were met.

World-Wide Volkswagen, 444 U.S. at 297. Indeed, BMS has never disputed that the California courts may exercise personal jurisdiction over it for the Plavix claims brought by California residents.

There also can be no dispute that the claims at issue are "related to" and "connected with" BMS's activities in California.[5] BMS engaged in a uniform, national marketing program for Plavix in all fifty states, with a common design and identical, FDA-approved labeling. And its drug caused similar injuries to plaintiffs across the country. Thus, all of the claims, by both California and non-California plaintiffs will require virtually identical discovery from BMS and also raise common issues of fact and law. Indeed, it is precisely because of the close relationship between all of these claims that the plaintiffs were able to join in multi-plaintiff lawsuits

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[5] Again, *Amicus* does not understand BMS to dispute this proposition. The company simply disputes whether claims "related to" or "connected with" a defendant's forum activities, as opposed to claims proximately caused by those activities, are sufficient to trigger specific jurisdiction. Pet'r's Br. 37. Yet, in every single case from *International Shoe* forward in which this Court has discussed case-specific jurisdiction, it invariably has included broader language encompassing claims "related to" or "connected with" the defendant's activities in the forum. *See, e.g.*, *Int'l Shoe*, 326 U.S. at 319 ("connected with"); *Goodyear*, 564 U.S. at 919 (same); *Helicopteros Nacionales*, 466 U.S. at 414 n.8 (1984) ("related to"); *Burger King*, 471 U.S. at 472 (same); *Nicastro*, 564 U.S. at 881 (both); *cf.* Twitchell, *supra*, at 655-56 ("Although requiring that the defendant have some purposeful contact with the forum and that the claim be connected to that contact significantly increases the chances that the forum will be fair, a particular degree of claim-relatedness is not a constitutional requirement for specific jurisdiction.").

under California joinder rules and that those suits were then approved for coordination under California's Judicial Council Coordinated Proceeding (JCCP) procedures. Cal. Code Civ. P. § 404.1 ("Coordination of civil actions sharing a common question of fact or law is appropriate if one judge hearing all of the actions for all purposes . . . will promote the ends of justice . . . .").

Finally, each of the other factors identified in *World-Wide Volkswagen*, 444 U.S. at 292, and reiterated in *Burger King*, 471 U.S. at 476-78, supports the conclusion that the California courts' exercise of jurisdiction here is consistent with "'traditional notions of fair play and substantial justice.'" The burden on BMS to litigate the claims of out-of-state plaintiffs in California is minimal, especially given that it concedes that it must defend the identical claims brought by California plaintiffs in this action. Indeed, it would likely be far more burdensome to have to litigate separate actions in each state in which one or more plaintiffs resides.

Likewise, California has an "interest in adjudicating the dispute," *id.* at 477, given the close connection between the out-of-state and in-state plaintiffs' claims, the state's interest in regulating BMS's marketing of Plavix because so many state residents use the drug, and the judicial economies and efficiencies that may be achieved by adjudicating the claims together. For precisely the same reason, such joint litigation in California serves both "'the plaintiffs' interest in obtaining convenient and effective relief'" and also "'the interstate judicial system's interest in obtaining the most efficient

resolution of controversies.'" *Id.*[6] Finally, because every state permits product liability actions to protect their citizens from unreasonably dangerous products and the companies that negligently market them, this litigation involving plaintiffs from multiple states advances the "'shared interest of the several States in furthering fundamental substantive social policies.'" *Id.* at 477.

Thus, each of the requirements articulated by this Court for specific personal jurisdiction are satisfied here. BMS has purposefully directed its marketing of Plavix into California; the claims at issue are "related to" and "connected with" those marketing activities; and the "other factors" identified in this Court's precedents support the exercise of jurisdiction. Because each of these requirements derives directly from the core due process principles articulated in *International Shoe*, there can be no doubt that California's assertion of personal jurisdiction over BMS in this case comports with "fair play and substantial justice."

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[6] *Amicus* does not mean to suggest that joint litigation in California would be superior to comparable joint litigation in any other state in which BMS has "purposefully established minimum contacts," *id.* at 476, but rather that such joint, multi-state litigation in any state with jurisdiction over BMS serves these purposes and thus renders the exercise of jurisdiction reasonable.

C. BMS Has Not Shown That California's Exercise of Personal Jurisdiction Is In Any Way Unfair or Unjust

BMS's contrary argument attempts to narrowly construe the meaning of the phrase "arise out of or relate to" as a matter of semantics, without any consideration of the relationship between the test it proposes and the Due Process Clause's concern with fair play and substantial justice. Pet'r's Br. 14-32. BMS concedes that its marketing of Plavix in California was sufficient to put it on notice that it might be haled into court there to answer for injuries caused by its drug and admits that there is nothing unreasonable or unduly burdensome about its being compelled to litigate in that forum. It nevertheless argues that it is not subject to personal jurisdiction in California for the claims of non-California plaintiffs simply because those plaintiffs do not reside in California and BMS's activities in that state were not the proximate cause of their injuries. But this Court has previously expressly held that "plaintiff's residence in the forum State is not a separate requirement [for personal jurisdiction], and lack of residence will not defeat jurisdiction established on the basis of defendant's contacts." *Keeton*, 465 U.S. at 780; *see also id.* at 779 ("[W]e have not . . . required a plaintiff to have 'minimum contacts' with the forum State before permitting that State to assert personal jurisdiction over a nonresident defendant.").

Just as important, BMS's argument ignores the critical question of fairness that is the touchstone of due process analysis. BMS offers this Court no

reason whatsoever to believe that the California courts' exercise of jurisdiction in this case would be in any way unfair or unjust to Petitioner. As this Court held more than seventy years ago in *International Shoe*, "due process requires *only*" that a court's exercise of personal jurisdiction over a defendant "not offend 'traditional notions of fair play and substantial justice.'" 326 U.S. at 316 (emphasis added). Absent such a showing, there is simply no basis on which to find a due process violation.

II. THE EXERCISE OF PERSONAL JURISDICTION OVER BMS IS CONSISTENT WITH BOTH THIS COURT'S PRECEDENTS AND WITH LONGSTANDING RULES FOR JOINT, MULTI-STATE LITIGATION.

The lower court's holding also is fully in keeping with this Court's prior precedent and with the federal practice of consolidating large numbers of state cases in federal multi-district proceedings. This Court, on at least two prior occasions, has rejected due process challenges to a court's exercise of personal jurisdiction over the claims of out-of-state plaintiffs against out-of-state defendants. *See Keeton*, 465 U.S. 770; *Shutts*, 472 U.S. 797. The Court also has indicated its approval of similar federal MDL proceedings under 28 U.S.C. § 1407, albeit without directly addressing that statute's constitutionality. These precedents strongly support the exercise of jurisdiction over BMS here.

Keeton involved a libel action brought by a New York resident against Hustler Magazine, an Ohio corporation, in the United States District Court for

the District of New Hampshire.[7] Petitioner Keeton sought to recover in that court for libel damages she had suffered in all fifty states. This Court ruled that Hustler's sale of 10,000 to 15,000 copies of its magazine in New Hampshire each month constituted sufficient minimum contacts to support personal jurisdiction over a libel claim based on the magazine's contacts, even for the claims for libel damages in other states. 465 U.S. at 773-74.

The Court reasoned that Hustler's purposeful conduct in circulating copies of its magazine in New Hampshire "unquestionabl[y]" satisfied *International Shoe*'s "minimum contacts" requirement for a complaint based on those contacts. *Id.* at 774. While it was "relevant to the jurisdictional inquiry" that Keeton was seeking damages for libel in all fifty states, this Court concluded that New Hampshire's interest in adjudicating the dispute was sufficient. *Id.* at 775-76. It was "beyond dispute that New Hampshire ha[d] a significant interest in redressing injuries that actually occur[ed] within the State." *Id.* at 776. But the state also had "a substantial interest in cooperating with other States . . . to provide a forum for efficiently litigating all issues and damage claims arising out of a libel in a unitary proceeding." *Id.* at 777. Such a unitary proceeding "reduces the potential serious drain of libel cases on judicial resources" and "also serves to protect defendants

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[7] Just as in state court, personal jurisdiction in federal district court was determined by application of the New Hampshire long-arm statute, which had been construed to "authoriz[e] service of process on nonresident corporations whenever permitted by the Due Process clause." 465 U.S. at 774.

from harassment resulting from multiple suits." *Id.* The combination of these two interests made it appropriate to require Hustler "to answer to a multistate libel action" in the state. *Id.* at 777-78. As the Court concluded: "Respondent produces a national publication aimed at a nationwide audience. There is no unfairness in calling it to answer for the contents of that publication wherever a substantial number of copies are regularly sold and distributed." *Id.* at 781.

The situation before this Court is closely analagous. BMS is a national corporation that regularly and continuously markets a drug, Plavix, through a uniform national marketing plan, aimed at consumers across the country. That drug has caused comparable injuries to users in virtually every state. BMS's purposeful conduct in advertising, marketing, and selling Plavix in California unquestionably satisfies the minimum contacts requirement for claims related to those contacts. California has both a strong interest in adjudicating claims for injuries caused by Plavix in that state and also a substantial interest in providing a forum for efficiently litigating all issues and damage claims arising out of BMS's uniform national marketing campaign. To paraphrase *Keeton*, there is no unfairness in calling BMS to answer for the injuries caused by the marketing of its drug wherever a substantial number of Plavix prescriptions are written and filled.[8]

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[8] BMS will no doubt attempt to distinguish *Keeton* by emphasizing the fact that it was the same plaintiff suing for libel damages in all fifty states, not multiple plaintiffs. But this Court addressed that concern in *Keeton* by noting that it is not a requirement of due process that a plaintiff have minimum

Shutts presented similar jurisdictional considerations in the context of a nationwide class action in Kansas state court. The case involved a dispute over delayed royalty payments for natural gas leases. Phillips Petroleum, a Delaware corporation with its principal place of business in Oklahoma, had negotiated leases to extract natural gas from land in eleven different states. Less than one percent of the leases were on Kansas land. The named plaintiffs in the lawsuit were citizens of Kansas and Oklahoma and owned gas leases in Oklahoma and Texas. They nevertheless filed a nationwide class action against Phillips challenging the delayed royalty payments in Kansas state court. Leaseholder class members came from all fifty states. 472 U.S. at 799-801.

Phillips challenged personal jurisdiction—not on its own behalf, but on behalf of absent plaintiff class members who lacked minimum contacts with Kansas! *Id.* at 802. Phillips made no argument whatsoever that the Kansas court lacked personal jurisdiction over it as a corporate defendant to adjudicate the issue of royalty payments on the 99+% of the leases that were not on Kansas land.

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contacts with the forum state in order for that state "to assert personal jurisdiction over a nonresident defendant." *Id.* at 779. "[R]espondent is carrying on a 'part of its general business' in New Hampshire, and that is sufficient to support jurisdiction when the cause of action arises out of the very activity being conducted, in part, in New Hampshire." *Id.* at 780. BMS carries on part of its general business of selling Plavix in California, and the claims of all plaintiffs arise out of that very activity, selling Plavix, rendering jurisdiction appropriate.

This Court rejected Phillips Petroleum's due process arguments, holding that the due process protections to which absent class members were entitled were fully satisfied by the certification, notice, and opt-out procedures employed by the Kansas courts. *Id.* at 814. More importantly for present purposes, the opinion is devoid of any suggestion that the defendant's due process rights were violated by adjudicating claims of non-Kansas class members (including two of the named plaintiffs) against a non-Kansas defendant and involving non-Kansas leases in Kansas state court. Given Phillips' express due process concerns with the binding effect of the Kansas judgment, it surely would have disputed the court's personal jurisdiction over it if it thought it had a plausible basis to do so. Nor did any Justice of this Court, in a case addressing due process and personal jurisdiction, ever suggest that there was any constitutional problem in forcing Phillips Petroleum to defend its royalty payment practices on non-Kansas leases in Kansas state court.

The situation here is analogous. The California courts propose to adjudicate the claims of all plaintiffs against BMS, both those plaintiffs who reside and were injured in California and those who reside and were injured elsewhere. As in *Shutts*, those claims arise from and relate to a common course of conduct by BMS, carried out nationwide and, in part, in California. The reason no challenge was made to the state court's personal jurisdiction over Phillips Petroleum in *Shutts* is equally applicable here: there simply is no basis to argue either that BMS lacks minimum contacts with California concerning its marketing of Plavix, or that

requiring BMS to defend claims by out-of-state plaintiffs related to that activity somehow offends "fair play and substantial justice."[9]

Another helpful analogy can be drawn from the federal practice of coordinating or consolidating cases filed in multiple districts for pretrial proceedings before a single federal judge through the MDL process established by 28 U.S.C. § 1407. BMS expressly points to this procedure as a preferable alternative to the multi-plaintiff proceedings in California state court pursuant to which Respondents could have achieved "efficiency and judicial economy . . . without undermining principles of personal jurisdiction." Pet'r's Br. 50. But BMS badly misperceives the relevance of § 1407 multi-

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[9] A similar observation can be drawn from *World-Wide Volkswagen*. The only parties that were held not to be subject to personal jurisdiction in Oklahoma for an auto accident that occurred there were Volkswagen's regional distributor World-Wide Volkswagen Corp., which distributed cars only to dealerships in New York, New Jersey, and Connecticut, and its New York-based retail dealership, Seaway Volkswagen, Inc., which sold cars only in the New York metropolitan area. *World-Wide Volkswagen*, 444 U.S. 288-89. This Court found that these defendants had not purposefully directed their activities at Oklahoma and had no minimum contacts there. *Id.* at 295-99. But there is no suggestion whatsoever in the opinion that the Oklahoma courts could not exercise personal jurisdiction over Volkswagen of America, Inc., even though the particular car involved in the underlying accident had not been sold in Oklahoma. To the contrary, the opinion states: "The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State." *Id.* at 297-98. And Volkswagen, itself, remained a defendant in the litigation. *Id.* at 288 n.3.

district litigation to the question before the Court; for if federal MDLs do not offend due process, then neither does California's exercise of personal jurisdiction over BMS in this case.[10]

Pursuant to 28 U.S.C. § 1407, the Judicial Panel on Multidistrict Litigation may transfer civil actions pending in multiple district courts to a single district for coordinated or consolidated pre-trial proceedings, so long as the civil actions involve one or more common questions of fact. An MDL may be created, and individual cases transferred, over the objection of some or all of the litigants. Moreover, there is no requirement that the transferee district be one in which all parties have "minimum contacts," or that the parties have any expectation they might be haled into court there. And, because the cases in an MDL retain their individual identity, a party and/or its counsel, whether plaintiff or defendant, can be compelled to participate in extensive pretrial proceedings in this distant forum, potentially at considerable cost in both time and expense. Yet, because of the judicial efficiencies and economies involved in addressing multiple actions involving common questions of fact, no one suggests, least of all BMS, that compelling the parties to conduct all pretrial proceedings in the transferee forum offends

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[10] *Amicus* is unaware of any case explicitly challenging or upholding the constitutionality of federal multi-district litigation pursuant to 28 U.S.C. § 1407. But this Court has, on a number of occasions, addressed the application of the act without raising any concerns about its constitutionality. *See, e.g., Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998).

"fair play and substantial justice," thereby violating due process.

The situation here is at least as fair and just. Pursuant to the California rules for coordination of civil actions involving common questions of law or fact, *see* Cal. Code Civ. P. § 404, the Judicial Council of California established a JCCP before a single state court judge for Plavix cases for the convenience of parties and the efficient utilization of judicial resources, and to promote the ends of justice.

Moreover, given that it is undisputed that the California courts have personal jurisdiction over BMS for the claims brought by California plaintiffs, the presence of common questions of fact ensure that the claims of out-of-state plaintiffs against BMS "relate to" and are "connected with" BMS's purposeful conduct in its marketing of Plavix, which took place, at least in part, in California. If it does not offend due process to compel litigants to pursue their claims through pretrial proceedings in a distant federal court in an MDL, even though the litigants may have no prior contacts with that forum, then *a fortiori* it does not offend due process to compel them to litigate their claims in a state court coordinated proceeding where the requirements for personal jurisdiction under *International Shoe* have been met.

III. State Law Provides Procedural Safeguards to Ensure that Multi-State, Multi-Plaintiff Litigation Does Not Offend Due Process.

It also is important to note that California, like virtually every state, provides numerous procedural safeguards to ensure that litigation involving out-of-state litigants does not offend "fair play and substantial justice." Choice-of-law rules, for example, protect litigants like BMS from being bound by California's substantive social policies when its actions cause injury in another state with different legal standards. *See Burger King*, 471 U.S. at 477. Moreover, if litigation in California is substantially inconvenient, and litigation elsewhere would be more reasonable, a litigant may seek relief through a motion to stay or dismiss the action on the ground of inconvenient forum, the motion traditionally known as *forum non conveniens*. Cal. Code Civ. P. § 418.10(a)(2).

As this Court recognized in *Burger King*, such procedural mechanisms will usually suffice to protect the due process rights of non-residents. 471 U.S. at 477. It will be the rare case in which a defendant "who purposefully has directed his activities at forum residents" will be able to make "a compelling case" as to why the exercise of jurisdiction is nevertheless unconstitutional. *Id.* BMS has not, and cannot, present such a compelling case here.

Meanwhile, if BMS's crabbed view of specific jurisdiction were the law, there would be little, if any, need for choice-of-law rules and *forum non conveniens* motions. If a state court could exercise

jurisdiction only over out-of-state defendants for claims that arose from, and were proximately caused by, the defendant's forum activities, such cases would almost always be governed by forum law, and that state's courts would be, in all likelihood, the most convenient forum in which to adjudicate the dispute.

Yet this Court repeatedly has cited to such procedural mechanisms as important non-constitutional protections available to out-of-state litigants, separate from the jurisdictional inquiry. *See, e.g.*, *Keeton*, 465 U.S. at 778 ("Strictly speaking, . . . any potential unfairness in applying New Hampshire's statute of limitations to all aspects of this nationwide suit has nothing to do with the jurisdiction of the court to adjudicate the claims. . . . [W]e do not think that such choice of law concerns should complicate or distort the jurisdictional inquiry."); *Burger King*, 471 U.S. at 477 (identifying choice-of-law rules and changes of venue as two such procedural accommodations). BMS's approach would relegate all such references to meaningless dicta—yet another reason to reject its artificially narrow understanding of specific jurisdiction.

IV. State Courts Traditionally Have Exercised Personal Jurisdiction Over Defendants in Multi-State Mass Torts and Class Actions

A. Principles of Federalism Do Not Limit a State Court's Exercise of Personal Jurisdiction over Out-of-State Parties.

BMS also argues that the strict limits on specific jurisdiction it seeks are required by principles of federalism, "'to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.'" Pet'r's Br. 25 (quoting *World-Wide Volkswagen*, 442 U.S. at 292). But that clearly is incorrect. As this Court has recognized: "State courts routinely exercise subject-matter jurisdiction over civil cases arising from events in other States and governed by the other States' laws." *Gulf Offshore Co.*, 453 U.S. at 481.

And, subsequent to *World-Wide Volkswagen*, this Court expressly *rejected* the notion that federalism concerns impose due process limits on a state court's exercise of personal jurisdiction:

> The requirement that a court have personal jurisdiction flows not from Art. III, but from the Due Process Clause. The personal jurisdiction requirement recognizes and protects an individual liberty interest. It represents a restriction on judicial power not

> as a matter of sovereignty, but as a matter of individual liberty.

Ins. Corp. of Ireland, 456 U.S. at 702. The Court went on to note that the Due Process Clause "makes no mention of federalism concerns." *Id.* n.10. "Furthermore," the Court observed, "if the federalism concept operated as an independent restriction on the sovereign power of the court, it would not be possible to waive the personal jurisdiction requirement." *Id.*

B. State Courts Have Long Overseen Multi-State Mass Tort and Class Action Litigations Concurrently with the Federal Courts.

Indeed, state courts traditionally have exercised jurisdiction over mass tort defendants regardless of their place of incorporation or principal place of business. Some examples include cases involving asbestos, the Dalkon Shield IUS, DES, Fen-Phen, latex gloves, orthopedic bone screws, silicone breast implants, and L-Tryptophan. *See* Federal Judicial Center, *Appendix D: Individual Characteristics of Mass Torts Case Congregations*, at 14, 23-26, 30-31, 37-38, 45-49, 53-55, 80-81 (Jan. 1999), http://www.uscourts.gov/sites/default/files/masstapd_1.pdf.

And State courts have exercised personal jurisdiction over defendants in mass actions, regardless of the location of the plaintiff or the plaintiff's injury. *See, e.g., In re Pelvic Mesh/ Gynecare Litig.*, 426 N.J. Super. 167, 170 (N.J. Super. Ct. App. Div. 2012) ("Several hundred

plaintiffs from many states have individually filed suit in New Jersey against defendants Johnson & Johnson and Ethicon, Inc., alleging they have suffered injuries caused by a line of defendants' medical products."); *Gross v. Gynecare*, No. A-0011-14T2, 2016 WL 1192556, at *1 (N.J. Super. Ct. App. Div. Mar. 29, 2016) (plaintiffs are residents of South Dakota).

Only post-*Daimler* have U.S.-based corporate defendants objected to the personal jurisdiction of state courts, arguing that, because they are not "at home" in the forum, and because *all* of the plaintiffs' claims did not arise out of the defendants' activities in the forum state, the defendant cannot be sued in a consolidated proceeding.

For decades, state and federal judges alike have taken concurrent personal jurisdiction as granted, endeavoring to coordinate their respective mass torts dockets. *See, e.g.*, Federal Judicial Center & National Center for State Courts, *Coordinating Multijurisdiction Litigation: A Pocket Guide for Judges*, at 1 (2013), http://ncsc.contentdm.oclc.org/cdm/ref/collection/civil/id/116. "Multijurisdiction litigation poses numerous challenges to the state and federal courts. With mutual respect and two-way communication, however, these challenges can be overcome. There is and should be respect among judges, as well as respect for principles of federalism, both of which foster cooperation to advance multijurisdiction litigation." *Id.*

Similarly, in class actions, this Court has determined affirmatively that state courts have jurisdiction over the claims of out-of-state plaintiffs

in nationwide class actions; personal jurisdiction over the defendants is assumed. *Shutts*, 472 U.S. at 799-802. And mass actions are not the only cases that would be affected by BMS's proposed narrowing of personal jurisdiction.

For example, in *Gulf Offshore Co.*, workers who were injured on an oil rig off the coast of Louisiana brought suit in Texas, and this Court assumed, as a preliminary matter, that Texas courts had personal jurisdiction over oil companies that "do[] business in Texas." 453 U.S. at 477 n.2. Under BMS's approach, jurisdiction could not lie in Texas simply because the corporations would have taken no action in Texas to have caused an injury in Louisiana. As this Court is aware, multi-defendant cases of this ilk regularly appear in federal court, and BMS's proposed rule would make it impossible in some circumstances to litigate the cases in one forum.

C. State Courts Are Well-Equipped to Adjudicate Mass Torts.

State courts, moreover, offer distinct advantages to litigants and are well-equipped to adjudicate mass tort claims. As Justice O'Connor put it:

> Part of the beauty of our federalism is the diversity of viewpoint[s] it brings to bear on legal problems. State court judges may have a different approach to a problem than might a federal judge; the lessons that can be learned from being a judge in one part of our country will not be immediately obvious to

> those who have always lived, practiced, and judged in another part.

Justice Sandra Day O'Connor, *Proceedings of the Middle Atlantic State-Federal Judicial Relationships Conference*, 162 F.R.D. 173, 181 (1994). "A federal court's viewpoint is not, by its nature, superior to that of a state court." *Id.* at 183. In particular, as this Court has recognized, "State judges have greater expertise in applying [tort] laws . . . ." *Gulf Offshore Co.*, 453 U.S. at 484.

With regard to mass torts in particular, in 2003, the National Center for State Courts reported that 98% of mass tort cases were ultimately resolved in state courts. National Center for State Courts, *Mass Torts: Lessons in Competing Strategies and Unintended Consequences*, 2 Civ. Action, no. 2, at 1 (Spring 2003), http://cdm16501.contentdm.oclc.org/cdm/ref/collection/civil/id/51. And state courts regularly proceed with discovery in mass torts well prior to the formation of any federal MDL. *See In re Johnson & Johnson Talcum Powder Prods. Mktg., Sales Practices & Prods. Liab. Litig.*, MDL No. 2738, slip. op. at 2-3, (J.P.M.L. Oct. 4, 2016), http://www.jpml.uscourts.gov/sites/jpml/files/MDL-2738-Initial_Transfer-09-16.pdf. Some states, like California, have even developed their own systems for coordinating mass tort litigations.

Importantly, state multidistrict litigation is regarded as being significantly faster than federal multidistrict litigation. *See* Hon. Larry V. Starcher, *Proceedings of the Middle Atlantic State-Federal Judicial Relationships Conference*, 162 F.R.D. at 205 ("Plaintiffs' attorneys forum-shop for not illegitimate

reasons, such as speed of resolution . . . . Defendants' attorneys 'milk the process and proceed at the rate that they see as most financially rewarding.'"). Unfortunately, for many plaintiffs in mass torts, delay can literally mean that they do not live to see justice.

Due process does not demand such a result.

CONCLUSION

For the foregoing reasons, *amicus curiae* Public Justice, P.C., urges this Court to affirm the ruling below and to remand this case for further proceedings.

Respectfully submitted,

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